APPENDIX

Copy of Petition and Answer in City of Highland Park, a Municipal Corporation, Nathan Simons and Seymour Simons, Testamentary Trustees of the Estate of D. W. Simons, Deceased, Kenneth M. Keefe, Ernest E. Quantrell and Pelham C. Wilmerding, Relators, v. Earl L. Clark, Drain Commissioner of Oakland County, and Board of Supervisors of Oakland County, Respondents.

PETITION FOR WRIT OF MANDAMUS

To the Honorable Judges of the Supreme Court of Michigan:

The petition of the above named relators shows unto the court as follows:

1. That on June 2, 1927, proceedings were instituted under Act 316, Michigan Public Acts of 1923, and acts amendatory thereof, to establish a drainage district to be known as Royal Oak No. 7 Storm Sewer Drain District, in the Township of Royal Oak, Oakland County, Michigan. Said proceedings progressed in accordance with said statutes and resulted in the building of a drain, the levy of assessments therefor, and issuance of bonds in anticipation of the payment of said assessments. Attached hereto and marked Exhibit A, to which reference is prayed for greater certainty, is an abstract of the proceedings, which includes copies of petitions, orders and notices relating to the establishment of the district, petition for the drain, determination of necessity, first and final orders of determination, and order for the issuance of bonds in the par amount of $191,000.00. In the last mentioned order is the form of the bonds issued and specification of the maturities thereof.

2. The entire issue of said bonds was purchased by Watling, Lerchen & Hayes, of Detroit, Michigan, at a price of par or better and accrued interest, and payment therefor was made to the Treasurer of said County of Oakland. Said bonds were immediately resold by said firm to various investors, and the unpaid bonds are now held by relators. Except as stated in the bonds, parties who purchased the same knew nothing of the purpose of the drain to be constructed with the proceeds thereof, and purchased the same in good faith and in reliance on the matters of fact recited therein. Of the bonds now outstanding, 65 are held by City of Highland Park, which it purchased for its sinking fund during the year 1928, 10 are held by Testamentary Trustees of the Estate of David W. Simons, Deceased, which the said David W. Simons acquired also during the year 1928. The balance of 75 are held jointly by the remaining relators, Kenneth M. Keefe, Ernest E. Quantrell and Pelham C. Wilmerding, who constitute a Bondholders Committee. All relators are either themselves *bona fide* holders of said bonds for value, or acquired them from *bona fide* holders for value.

3. With the proceeds paid for said bonds by Watling, Lerchen & Hayes, the Drain Commissioner of Oakland County constructed the said drain along the route shown in the proceedings, Exhibit A. The structure is in the form of an underground conduit of reinforced concrete and vitrified tile, ranging from 54 inches in diameter to 12 inches in diameter. The drain district is for the most part subdivided, and the drain is laid in streets and alleys except for a portion laid through unplatted acreage. It has all necessary inlets to receive surface water, and has the size and capacity appropriate for removing all surface drainage water in the area, and has served this purpose since its construction. A few houses, which to July 1, 1932 did not exceed 19, have been permitted to connect with it for the purpose of removing household sewage.

4. For a period since May 1, 1931, the bonds have been in default due to the suspension of the levy of installments of the assessment for said drain during the years 1932 to 1936, inclusive. All bonds are now past due and interest is in default since May 1, 1940.

5. After prolonged negotiations for a settlement in relation to the bonds, relators agreed in writing with respondent, Earl L. Clark, Drain Commissioner, and other officers of the County, for a cancellation of 30% of the interest which had accrued on the bonds to May 1, 1940, and for the issuance of bonds to refund the indebtedness. A copy of their agreement is attached hereto and marked Exhibit B, to which reference is prayed. In accordance with said agreement, relators surrendered their coupons to the County Treasurer of said County and consented to an endorsement on their bonds of a receipt for all interest to May 1, 1940, and were paid a sum equal to 70% of the interest thereon which accrued to May 1, 1940.

6. Respondent Drain Commissioner thereupon applied to the Michigan Public Debt Commission for authority to issue refunding bonds, and on February 13, 1941, an order was entered by said Commission authorizing such issue. A copy thereof is hereto attached and marked Exhibit C, to which reference is prayed for greater certainty.

7. Relators are now informed by respondents that they will neither issue such refunding bonds, nor levy any taxes for the payment of the existing bonds. By an exchange of letters between the City Attorney of Highland Park and respondent Drain Commissioner, copies of which letters are hereto attached and marked Exhibits D and E, relators are informed that respondents consider that the existing bonds are invalid and that this is their ground for such refusal.

8. Since respondents, whose duties are to levy and spread taxes necessary to provide funds for the payment of relators' bonds, refuse to do so, and there is no other presently available source of money for their payment, relators are obliged to ask the aid of the court through the issuance of a writ of mandamus, to compel such levy and spread of taxes for said drain as is provided in Sections 4924, 4925 and 4940 of the Compiled Laws of Michigan, 1929. While relators would still be willing to accept refunding bonds as contemplated by the order of the Michigan Public Debt Commission, if same were tendered to them promptly, they are advised and believe that they may not petition for a writ of mandamus to compel the issuance of the same, since the matter of their issuance is discretionary with the Drain Commissioner.

Wherefore, relators, having no other available remedy, pray:

1. That this court issue under its seal a peremptory writ of mandamus directing and commanding the respondents, Earl L. Clark, Drain Commissioner of Oakland County, and Board of Supervisors of said County, to severally and collectively, as provided by Sections 4924, 4925 and 4940, Compiled Laws of Michigan 1929, perform such acts as will result in the levy, certification and spread of all unpaid portions of installments of taxes levied for said drain, and such supplemental or deficiency assessment as shall be sufficient to pay all outstanding bonds of said Royal Oak No. 7 Storm Sewer Drain District.

2. That an order to show cause issue to said respondents, directing them to make answer under oath to this petition, and therein to show cause, if any, why such writ of mandamus should not issue.

City of Highland Park, by Earl B. Young, City Attorney; Nathan Simons and Seymour Simons, Testamentary Trustees of the Estate of D. W. Simons, Deceased, by Levin, Levin & Dill; Kenneth M. Keefe, Ernest E. Quantrell and Pelham C. Wilmerding, by Irvin Long, Elroy O. Jones, Their Attorneys.

Exhibit A, attached to the petiton, is a transcript of the drain proceedings, with some abbreviations. Exhibit A-23 contains the bond form, as follows:

UNITED STATES OF AMERICA

Number 52 — Dollars 1000

STATE OF MICHIGAN
COUNTY OF OAKLAND
ROYAL OAK NO. 7 STORM SEWER DRAIN DISTRICT BOND

KNOW ALL MEN BY THESE PRESENTS, that the Royal Oak No. 7 Storm Sewer Drain District of the County of Oakland, State of Michigan, is justly indebted and, for value received, hereby promises to pay to the bearer hereof the sum of

One Thousand Dollars

lawful money of the United States of America, on the FIRST DAY OF MAY, 1933, with interest thereon at the rate of 5½% per annum, payable semi-annually on May 1 and November 1 of each year on presentation and surrender of the annexed interest coupons as they severally

become due. Both principal and interest of this bond are payable at the GRISWOLD-FIRST STATE BANK, of Detroit, Michigan.

This bond is one of a series of One Hundred Ninety-one bonds of like date and tenor, except as to date of maturity, aggregating the sum of $191,000.00 issued under authority of and in full compliance with the provisions of Act No. 316 of the Public Acts of Michigan, 1923, as amended by Act No. 365 of the Public Acts of Michigan, 1925, and Act No. 331 of the Public Acts of Michigan, 1927.

The principal and interest of this bond are payable out of the installments of drain taxes assessed against the lands in the said district and against the City of Ferndale and the Village of Oak Park at large, in proportion to their respective taxation for such improvement as follows: lands in District 76.0688% City of Ferndale 15.7288% and the Village of Oak Park 8.2024%, and are issued for the payment of the cost of construction of the Royal Oak No. 7 Storm Sewer Drain in the Township of Royal Oak and the City of Ferndale in said Oakland County, under and in pursuance of the statutes aforesaid and by lawful authority, and the amount of said issue does not exceed the aggregate of the installments of such drain taxes levied, and in case the amount available in the drain fund for said drain shall be insufficient to pay the principal or interest of any of such bonds when they become due the same shall be advanced and paid by the County of Oakland out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected, provided that such advancement by the County shall not cause the total debt of the County to exceed the constitutional limitation thereof.

It is hereby certified and recited that all acts, conditions and things required to be done, precedent to and in the

issuance of this bond, in order to make it a binding obligation of the Royal Oak No. 7 Storm Sewer Drain District, have been done, have happened and have been performed in due form and time as required by law, and for the prompt payment hereof and of the interest hereon the full faith, credit and resources of said Drain District are hereby irrevocably pledged.

IN WITNESS WHEREOF, the Drain Commissioner of the County of Oakland for and on behalf of said Royal Oak No. 7 Storm Sewer Drain District has caused this bond to be signed by the County Drain Commissioner and countersigned by the County Clerk of said County of Oakland as of the second day of July, A. D. 1928.

.....

Drain Commissioner, Oakland
County, Mich.

Countersigned:

.....

County Clerk, Oakland
County, Michigan

COUPON

No..... ....

THE COUNTY TREASURER, of the County of Oakland, State of Michigan, will pay to the bearer of this coupon at the Griswold First State Bank, Detroit, Michigan, the sum of.....(.....) from the funds of the Royal Oak No. 7 Storm Sewer Drain District in said County, being the semi-annual interest due that day on its Royal Oak No. 7 Storm Sewer Drain District Bond, dated July 2, 1928.

No.....

....

County Clerk County Drain Commissioner

ANSWER TO PETITION FOR WRIT OF MANDAMUS

Comes now Charles L. Wilson, Prosecuting Attorney of the County of Oakland, by Harry J. Merritt, Corporation Counsel, statutory attorney for Earl L. Clark, Drain Commissioner of Oakland County and the Board of Supervisors of Oakland County and makes answer to said petition as follows:

1. They admit the allegations in the first sentence of paragraph one contained.

They deny the allegations in the second sentence in paragraph one, that a drain was built in pursuance of said proceedings, averring affirmatively that a sewer instead of a drain was built and that this Court so determined in *Village of Oak Park v. Van Wagoner,* 271 Mich. 450.

They admit the allegations in the third and fourth sentences in paragraph one contained purport to be copies of petitions, orders, etc. relative to the establishment of a drain district but aver that a drain was not constructed in pursuance thereof but a sewer.

2. They admit the allegations in the first sentence of paragraph two and neither admit nor deny the remaining allegations in said paragraph having no knowledge thereof and leave plaintiffs to their proof thereon.

3. They deny the allegations in the first sentence of paragraph three contained and affirmatively aver that the then Drain Commissioner of Oakland County constructed a sewer.

They admit the allegations in the second sentence of paragraph two contained.

They deny the inference that a drain district exists as alleged in the third sentence of paragraph three, deny that

a drain is laid in the streets and alleys averring the same to be a sewer.

They admit the allegations in the fourth sentence of paragraph three contained but aver that the same is a sewer and has been so held by this Court, and aver that the question as to whether or not the project was a drain or a sewer is *res adjudicata.*

They neither admit nor deny the allegations in sentence five of paragraph three contained having no knowledge thereof and leave plaintiffs to their proofs thereon.

4. They admit that the purported instruments which plaintiffs call bonds have been in default but deny that the instrument is a bond averring that under the Michigan decision and the Federal decisions the bond as such is a void instrument.

5. Defendant Earl L. Clark admits the allegations in paragraph five contained but Defendant Board of Supervisors of Oakland County denies that the agreement was executed with their authority or approval, affirmatively averring that it was beyond the scope of authority of the Drain Commissioner or the Board of Auditors, they being ministerial officers, and that such an agreement is void, without authorization of law and contrary to public policy.

6. Defendant Earl L. Clark admits the allegations therein contained but Defendant Board of Supervisors of Oakland County deny that such activities of the Drain Commissioner were with their approval or authority, that his activities in that connection were unauthorized, beyond the scope of his authority and of no force or effect as far as the Board of Supervisors of Oakland County are concerned.

7. They admit the allegations in paragraph seven contained.

8. They deny that there is any duty on their part to spread taxes in connection with said illegally constructed sewer, admit that they refuse to do so and affirmatively aver that it is their duty to so refuse, admit that there is no money presently available for payment but deny that this Court should issue its writ of mandamus to compel any levy or spread of taxes to provide money for an illegal project. They deny that either the Drain Commissioner or the Board of Supervisors has any right or duty to continue said contemplated refunding and admit the remaining allegations in said paragraph.

Wherefore respondents pray:

1. That the prayers in paragraphs one and two of relators' prayer be denied.

2. That the petition be dismissed, the matter being *res adjudicata.*

3. That respondents have costs of Court.

CHARLES L. WILSON,
Prosecuting Attorney.
By HARRY J. MERRITT,
Corporation Counsel.